



Second Follow-up Review of Jefferson County's Indigent Defense Systems

October 2022



209 W. 14th Street, Room 202 (Price Daniel Building)
Austin, Texas 78701
Phone: 512.936.6994; Fax: 512.463.5724
www.tidc.texas.gov

Chair:

Honorable Sharon Keller Austin, Presiding Judge, Court of Criminal Appeals

Ex Officio Members:

Honorable Sharon Keller	Austin, Presiding Judge, Court of Criminal Appeals
Honorable Nathan L. Hecht	Austin, Chief Justice, Supreme Court of Texas
Honorable John Whitmire	Houston, State Senator
Honorable Brandon Creighton	Conroe, State Senator
Honorable Nicole Collier	Fort Worth, State Representative
Honorable Reggie Smith	Sherman, State Representative
Honorable Sherry Radack	Houston, Chief Justice, First Court of Appeals
Honorable Vivian Torres Rio	Medina, Medina Statutory County Judge

Members Appointed by the Governor:

Mr. Alex Bunin Defender Office	Houston, Chief Public Defender, Harris County Public Defender Office
Honorable Richard Evans	Bandera, Bandera County Judge
Honorable Valerie Covey	Georgetown, Williamson County Commissioner
Honorable Missy Medary Judicial Region of Texas	Corpus Christi, Presiding Judge, 5th Administrative
Mr. Gonzalo Rios, Jr.	San Angelo, Attorney, Gonzalo P Rios Jr Law Office

Staff:

Geoff Burkhart	Executive Director
Wesley Shackelford	Deputy Director
Christian Bowne	Grant Specialist
Megan Bradburry	Executive Assistant
Kathleen Casey-Gamez	Senior Policy Analyst
Edwin Colfax	Director of Grant Funding
William R. Cox	Senior Policy Analyst
Scott Ehlers	Director of Public Defense Improvement
Linda Gonzalez	Senior Policy Analyst
Olivia Lee	Policy Analyst
Crystal Leff-Pinon	Senior Policy Analyst
Joel Lieurance	Senior Policy Monitor
Kristin Meeks	Policy Analyst
Nicolas Sawyer	Policy Analyst
Debra Stewart	Fiscal Monitor
Doriana Torres	Grant Specialist
Sharon Whitfield	Budget & Accounting Analyst

Mission: Protecting the right to counsel, improving public defense

Contents

Background	4
October 2022 Follow-up Review	5
Program Assessment	7
Requirement 1: Conduct prompt and accurate Article 15.17 proceedings.	7
Requirement 2: Determine indigence according to standards directed by the indigent defense plan.	8
Requirement 4: Appoint counsel promptly.	11
Requirement 5: Attorney Selection Process.	14
Pending Recommendations	15

Executive Summary

The Texas Indigent Defense Commission (TIDC) monitors local compliance with the Fair Defense Act through policy reviews.¹ In this second follow-up review, TIDC observed court, interviewed officials, and reviewed FY2021 data from Jefferson County. TIDC found that there are two pending recommendations after the October 2022 review:

- a. Appointments of counsel are delayed for defendants making bail in the period between an Article 15.17 counsel request and the court coordinator making appointments of counsel.
- b. Maximum caseload limits set by felony contracts are not always followed.

TIDC thanks Jefferson County officials and staff for their assistance in completing this review. TIDC staff stands ready to provide technical and financial assistance to remedy these issues. TIDC will attempt to conduct a third follow-up review regarding its findings within two years.²

Background

In 2010, TIDC conducted a fiscal monitoring review of Jefferson County. The report identified the use of a felony contract defender system where contract attorneys would initially be appointed to a case but would later be replaced if the case moved to the trial docket. The issue was brought before TIDC's Policies and Standards Committee on June 6, 2011. The Committee discussed the issue but did not reach a resolution regarding the automatic replacement of counsel for cases moving to the trial docket. At a meeting of the full TIDC Board on December 1, 2011, the Board directed staff to perform an onsite review of the contract defender system in Jefferson County.

The contract defender system review examined the felony appointment process operated by the district courts (who used the contract defenders). TIDC did not review the other elements of the Fair Defense Act (FDA), such as the distribution of appointments or methods for making misdemeanor and juvenile appointments. The report (issued in July 2012) made recommendations regarding the duration of representation by appointed counsel and the use of bail in determining indigence. The County responded to the report recommendations by amending its indigent defense plan for felony cases.

In February 2013, Senator Rodney Ellis and Representative Joe Deshotel sent a letter to Jefferson County Judge Jeff Branick, documenting their concerns about low attorney appointment rates in the County and about the use of bail in

¹ TEX. GOV'T CODE § 79.037(a)–(b).

² Title 1 TEX. ADMIN. CODE § 174.28(c)(2).

determining indigence. In April 2013, TIDC staff met with County officials, and after a discussion, both agreed that TIDC would conduct a full policy monitoring review of the County's indigent defense practices. Judge Branick sent a letter requesting this review.

TIDC issued its full policy monitoring report in April 2014. The report made nine recommendations, focusing on methods for conducting magistrate warnings, determining indigence, and making prompt appointments of counsel. TIDC found that, in felony cases, courts promptly appointed counsel for persons who remained in jail, but appointments for persons making bail were delayed. The felony courts responded by noting they were putting in place a system to promptly rule on counsel requests and made assurances that requests for counsel by defendants in custody for more than 24 hours would be promptly reviewed.

In misdemeanor cases, the courts did not have procedures to promptly rule on requests made at the Article 15.17 hearing. Misdemeanor defendants requested counsel at the Article 15.17 hearing, but sometimes did not receive rulings on the requests, and later entered uncounseled pleas. In response, the misdemeanor courts stated that the affidavit of indigence would be provided to defendants at the Article 15.17 hearing and the courts would make indigence determinations on the receipt of the financial forms.

TIDC conducted a follow-up review in 2020 to verify whether recommendations from the 2014 review had been successfully addressed. The review found that the County had satisfied four of the ten recommendations from the April 2014 monitoring report. Specifically, magistrates asked all defendants if they wanted to request counsel, and the felony courts made timely appointments of counsel.

October 2022 Follow-up Review

TIDC's Policy Monitoring Rules require follow-up reviews of counties where the report included noncompliant findings.³ Staff members William R. "Bill" Cox and Joel Lieurance conducted the second follow-up review. The purpose of this review was to verify that the June 2020 report recommendations were addressed. The review consisted of a site visit to Jefferson County between April 12th and 14th, as well as interviews and data queries conducted off-site. TIDC relied on the following items in preparing this report: felony and misdemeanor cases filed in FY2020 (October 2019 – September 2020); felony and misdemeanor dockets; a magistrate warning docket; interviews with Jefferson County officials and staff; the Indigent Defense Expense Report (IDER) data; and the local indigent defense plans. The County must respond to this report's findings and recommendations.

³ 1 TEX. ADMIN. CODE § 174.28(d)(3).

Table 1: History of Monitoring Findings

FDA Core Requirement	Description and Initial Year of Finding	Status after Oct. 2022 Review	
		Satisfied	Pending
1. Prompt Magistration	The magistrate must make a record as to whether each arrestee at the Article 15.17 hearing requests counsel. (2014)	✓ (2020)	
1. Prompt Magistration	The magistrate must ask persons arrested on out-of-county warrants whether they want to request counsel. (2014)	✓ (2020)	
1. Prompt Magistration	The magistrate must ensure reasonable assistance in completing affidavits of indigence and must ensure the paperwork is transmitted to the appointing authority within 24 hours. (2014)	✓ (2022)	
2. Indigence Determination	The County must implement procedures to follow the felony and misdemeanor indigent defense plans' standard of indigence. (2014)	✓ (2022)	
2. Indigence Determination	The felony courts must ensure that re-determinations of indigence are only made when there is evidence of a material change in financial circumstances. (2020)	✓ (2022)	
4. Prompt Appointment	The felony courts must promptly rule upon all requests for counsel, regardless of whether the defendant makes bail. (2014)	✓ (2020)	
4. Prompt Appointment	The misdemeanor courts must promptly rule on all requests for counsel. (2014)	✓ (2022)	
4. Prompt Appointment	Appointments of counsel are delayed for defendants making bail in the period between Article 15.17 counsel requests and the court coordinator making appointments of counsel. (New Finding 2022)		✓
4. Prompt Appointment	The misdemeanor courts must ensure all requests for counsel are ruled upon prior to a waiver of counsel. ⁴ (2014)	✓ (2022)	
5. Attorney Selection Process	The contracts for felony cases need to include a maximum caseload or workload. (2014)	✓ (2020)	
5. Attorney Selection Process	Jefferson County must follow the maximum caseload terms set in its contracts with attorneys handling felony cases. (2020)		✓

⁴ In some instances, defendants entered uncounseled pleas, but the case files did not include waivers of counsel.

Program Assessment

TIDC compared the core requirements of the Fair Defense Act (FDA) with the County's performance for each recommendation listed in the 2020 report. This review examined previous findings and recommendations covering the following core FDA requirements:

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

REQUIREMENT 2: INDIGENCE DETERMINATION STANDARDS

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

REQUIREMENT 5: ATTORNEY SELECTION PROCESS

Requirement 1: Conduct prompt and accurate Article 15.17 proceedings.

At the Article 15.17 hearing, the magistrate must inform the accused of their right to counsel, ask whether the accused wants to request counsel, and receive the accused's request for counsel.⁵ The magistrate must make a record of each step of this exchange.⁶ Once a magistrate receives a request for counsel, they must ensure reasonable assistance in completing necessary forms at the same time.⁷ Then they must transmit the request (and the associated financial paperwork) to the appointing authority within 24 hours.⁸

Previous reviews found that there was no method for gathering financial information at the time of the Article 15.17 hearing.

TIDC observed 15.17 hearings on April 14, 2022. The magistrate advised each arrestee of their rights and inquired if each person wanted to request appointed counsel, all of which was recorded. If a person requested counsel, the magistrate inquired about relevant financial information, then ruled on the request. The magistrate told defendants who qualified that an appointed attorney would contact them soon. TIDC staff observed the Indigent Defense Coordinator (IDC) arrive at the 15.17 hearings and receive the completed indigence determinations from the magistrate. This practice addresses TIDC's recommendation that the County must put in place a method for gathering relevant financial information at the time of magistrate warnings.

⁵ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁶ TEX. CODE CRIM. PROC. ART. 15.17(e).

⁷ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁸ TEX. CODE CRIM. PROC. ART. 15.17(a).

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1: CONDUCT
PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS.**

2020 Recommendation: Article 15.17(a) requires that the magistrate ensure reasonable assistance in completing the forms for requesting counsel at the time of the hearing. These forms must be transmitted to the appointing authority within 24 hours of the request being made. A method must be put in place to provide these forms to arrestees at the time of the Article 15.17 hearing, to ensure reasonable assistance in completing the forms, and to transmit them to the appointing authority within 24 hours.

Successfully addressed.

Requirement 2: Determine indigence according to standards directed by the indigent defense plan.

Under Article 26.04(l) of the Code of Criminal Procedure, counties must adopt procedures and financial standards for determining whether a defendant is indigent. Article 26.04(m) lists the factors courts may consider in determining indigence. Article 26.04(m) states:

In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

The local standards for determining indigence are set in each county's indigent defense plans. For felony cases in Jefferson County, defendants with an income below 100% of the Federal Poverty Guidelines are presumed indigent. In misdemeanor cases, defendants are presumed indigent if they have an income less than 125% of the Federal Poverty Guidelines. For both felony and misdemeanor cases, a defendant is presumed indigent if (1) eligible for food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing; or (2) currently serving a sentence in a correctional institution, residing in a public mental health facility, or subject to a proceeding in which admission or commitment to such mental health facility is sought.

Once a person is determined to be indigent, both the district courts' plan and the county courts' plan presume the defendant remains indigent unless a material change in the person's financial circumstances occurs.⁹

Use of Bail Status to Determine Indigence in Felony Cases

In past reviews, TIDC found that, in felony cases, defendants who made bail were not considered indigent. Furthermore, if a defendant had been appointed counsel, counsel was removed if the defendant made bail.

Article 26.04(l) of the Code of Criminal Procedure requires that procedures and standards for determining indigence apply to each defendant equally, regardless of whether the defendant is in custody or has been released on bail. Once counsel is appointed, Article 26.04(p) and the local indigent defense plan presume the defendant remains indigent unless there is a material change in the defendant's financial circumstances. The courts handling felony cases must ensure that, if counsel has been appointed, the appointment stands unless there is a material change in the defendant's financial circumstances.

In the current review, court observations and interviews with Jefferson County staff indicated that Court staff did not make additional indigence inquiries after appointment. TIDC staff observed the indigence applications being reviewed and approved during the magistration process. TIDC staff did not observe re-determinations of indigence in court or in the sample case files. Further, interviews with Court staff reflected that Court staff only made changes in appointed counsel with the assent of the accused.¹⁰

Determinations of Indigence in Misdemeanor Cases

In misdemeanor cases, previous reviews found that the courts did not rule on out-of-court counsel requests. When bonded misdemeanor defendants made in-court requests for appointed counsel, the Court directed defendants to interview with an indigent screening coordinator. The indigence screening consisted of two interviews. At the first interview (right after the misdemeanor docket), the defendant was given a list of documentation to bring to the second interview. The second interview was typically scheduled about one month later when the defendant was required to bring W-2 tax forms, evidence of employment (current income), disability payments,

⁹ The requirement is also set in Article 26.04(p) of the Code of Criminal Procedure.

¹⁰ *Stearnes v. Clinton*, 780 S. W. 2d 216 (Tex. Crim. App. 1989).

available credit card balances, checking or savings account balances, and relevant expenses. This timeframe was beyond statutory allowances.¹¹

During the 2022 review, TIDC staff observed the magistrate ask each defendant if they wanted to request appointed counsel. For all defendants who requested appointed counsel, defendants had already completed indigency applications with the assistance of jail staff who then forwarded the applications to the magistrate. The magistrate reviewed and ruled on each application, advising the person if counsel was appointed, and if so, when to expect to hear from the appointed attorney.

For in-court counsel requests, Jefferson County staff indicated that the two-step process had been discontinued and all indigence screenings for misdemeanor dockets were handled at the Court hearing. TIDC staff observed County Court at Law judges advise defendants of their right to counsel, distribute indigence applications, and then review and rule on the applications in court, appointing counsel to the defendants who qualified. In addition, TIDC staff observed Court staff responding to questions from defendants and assisting them in completing the applications.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN.

2020 Recommendation: The County must implement procedures to follow the felony and misdemeanor indigent defense plans' standard of indigence.

Successfully addressed.

2020 Recommendation: The courts handling felony cases must ensure that re-determinations of indigence are only made when there is evidence of a material change in financial circumstances.

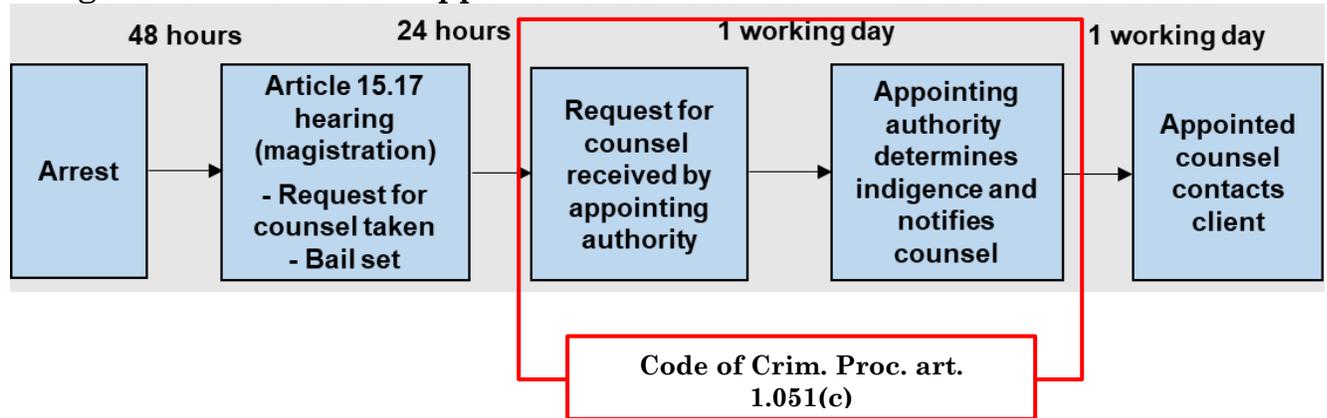
Successfully addressed.

¹¹ Article 1.051(c)(2) of the Code of Criminal Procedure requires the court or its designee to appoint counsel by the end of the first working day following receipt of the request for counsel.

Requirement 4: Appoint counsel promptly.

Under Article 1.051(c) of the Code of Criminal Procedure, courts in counties with a population over 250,000 must rule on a request for counsel within one working day of receiving the request.

Figure 1: Timeline for Appointment of Counsel in Adult Criminal Cases



Timeliness of Appointment in Misdemeanor Cases

To assess the timeliness of Jefferson County's appointment procedures in misdemeanor cases, TIDC staff examined the time from request for counsel to appointment or denial of indigence. Under the TIDC's monitoring rules, a county is presumed in compliance with the prompt appointment of counsel requirement if at least 90% of indigence determinations in the monitor's sample are timely.¹² TIDC staff examined 198 cases filed from April 2021 to September 2021. TIDC staff were able to determine the time from request to appointment in 106 sample cases, and counsel was appointed timely in 95 cases (90% timely). This percentage meets TIDC's 90% timely threshold for presuming a jurisdiction's procedures ensure the prompt appointment of counsel.

¹² 1 TEX. ADMIN. CODE § 174.28.

Table 2: Times to Appointment in Misdemeanor Cases

Jefferson Misdemeanor Appointment Sample Data	Sample Size	Number from sample	Percent
Number of case files examined	198		
Total cases with a counsel request in which time to appointment could be determined		106	
Appointment / denial of indigence occurred in:			
0 work days		85	80%
1 work day + 24 hour transfer		10	9%
Timely appointments (0 – 1 work days)		95	90%
2 work days + 24 hour transfer		3	3%
More than 2 work days		8	8%
No ruling		0	0%
Late appointments (more than 1 work day) or no ruling on request		11	10%

Jefferson County’s success in appointing counsel to indigent misdemeanor defendants is reflected in Table 3.

Table 3: Percentage of Misdemeanor Cases with Appointed Counsel

	Texas 2020	Jefferson 2021	Jefferson 2020	Jefferson 2019	Jefferson 2018
% Misdemeanor Charges Defended with Appointed Counsel	49%	42%	21%	12%	9%

Waivers of Counsel in Misdemeanor Cases

During previous reviews, TIDC identified misdemeanor cases in which defendants requested counsel, but could not find orders appointing counsel or denying indigence. While some of these defendants may have been told by the magistrate that counsel had been appointed for the defendant, TIDC could not find any corresponding order appointing counsel.

In April 2022, TIDC observed the Courts advising defendants without counsel of their right to request appointed counsel, providing application forms and assistance completing those forms, and ruling on the request prior to taking substantive action on the case. Further, the Courts informed defendants choosing to represent themselves that they must read and sign a waiver of counsel prior to doing so. These changes reflect Jefferson County’s effort to put processes in place to ensure compliance with Article 1.051(f-2).

Appointing Counsel Pursuant to Jefferson County's Indigent Defense Plan

The 2022 review identified cases where defendants in misdemeanor and felony cases submitted approved indigence applications from the 15.17 hearing and the defendant posted bond prior to the indigent defense coordinator (IDC) appointing counsel. Jefferson County staff indicated that when a person posts bond after magistration but before the appointment of counsel, the appointment occurs at the first court hearing after the case is filed. This delay was most pronounced on weekends and holidays, where the IDC appointed counsel on the next business day. TIDC staff discussed the concern that this process does not follow either Jefferson County's Indigent Defense Plan nor Article 1.051(c)(1), and officials and staff indicated that they would address the matter. Jefferson County must follow its Indigent Defense Plan and the timeframes required in the Texas Code of Criminal Procedure to appoint counsel after a defendant is found to be indigent.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

2020 Recommendation: The misdemeanor courts must put in place a method to promptly rule upon requests for counsel.

Successfully addressed.

2020 Recommendation: In accordance with Article 1.051(f-1) and (f-2), the misdemeanor courts must implement procedures to ensure that all requests for counsel are ruled upon prior to any waiver of counsel.

Successfully addressed.

2020 Recommendation: Based upon in-court observations and interviews with local staff, the misdemeanor courts do not determine indigence within statutory time frames set forth in state law or in the local indigent defense plan. The actual practices must comport with written procedures for determining indigence and appointing counsel.

Successfully addressed.

2022 Recommendation: Appointments of counsel are delayed for defendants making bail in the period between Article 15.17 counsel requests and the court coordinator making appointments of counsel.

New Finding 2022.

Requirement 5: Attorney Selection Process.

TIDC has established Contract Defender Rules (Title 1, Rules 174.10 – 174.25 of the Texas Administrative Code). TIDC measures the fairness of the selection process in contract cases by whether there is an open solicitation process that meets this requirement in the Contract Defender Rules. TIDC also reviews the contents of contracts to ensure they address all elements required by the rules.

In the 2014 review, TIDC found that the contracts for felony cases did not include a maximum caseload or workload.¹³ Before the 2020 review, the contracts were amended to limit appointed attorney’ caseloads to a maximum of 150 felony cases per year.¹⁴ In FY2018 data reported to TIDC by the Jefferson County Auditor’s Office, five attorneys disposed more than 150 felony cases during the year. The 2022 review noted that FY2021 data reported to TIDC listed attorneys exceeding the Jefferson County limit of 150 disposed felony cases per year. Based on interviews with officials and staff, there is no current method in place to measure appointments as they are made. Officials advised staff in April 2022 that COVID backlogs have created significant challenges for the County with caseload limits and that Jefferson County is working to ensure felony attorneys’ caseloads follow the adopted limits.

Table 4: Non-Capital Felony Cases Disposed by Contract Attorneys

Attorney Name	2021	2020	2019
Barlow, David W.		146	195
Cribbs, Kevin Sekaly	101	127	117
Duesler, Donald Wayne	136	107	164
Grove, Donald E.	119	86	189
Holmes Brittanie	219	132	141
Kelley, Thomas		126	180
Laine, Kevin	254	95	135
Normand, Marsha A.	197	141	143
Parker, Carl Allen	183	131	197
Rojas, Charles Frank	125		
Van Zandt, Phillip Michael	228	179	221

¹³ This requirement is set in 1 Tex. Admin. Code § 174.21.

¹⁴ The contract states, “The maximum caseload allowed Attorney pursuant to their contract should not exceed 150 felony cases per year.”

FINDINGS AND RECOMMENDATION FOR REQUIREMENT 5: ATTORNEY

SELECTION PROCESS.

2020 Recommendation: Jefferson County must follow the maximum caseload terms set in its contracts with attorneys handling felony cases.

Issue Pending.

Conclusion

TIDC enjoyed meeting with Jefferson County officials and staff and appreciates their cooperation during this review. TIDC stands ready to provide any assistance, including grant funding, the County may need to address the issues identified in this report.

Pending Recommendations

Jefferson County must respond in writing about how it will address each of the pending recommendations. TIDC stands ready to provide any assistance, including grant funding, the County may need to address the issues identified in this report.

Requirement 4: Appoint counsel promptly.

2022 Recommendation 1: Appointments of counsel are delayed for defendants making bail in the period between Article 15.17 counsel requests and the court coordinator making appointments of counsel.

Requirement 5: Attorney Selection Process.

2022 Recommendation 2: Jefferson County must follow the maximum caseload terms set in its contracts with attorneys handling felony cases.